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IN THE

Supreme Court of the United States

October Term, 1962

Number 580

J. BENJAMIN HALL,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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J. BENJAMIN HALL,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes J. Benjamin Hall, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted and tried in the United States District Court for the Northern District of Georgia on

a five count indictment charging four different occasions of possessing and selling distilled spirits in violation of the Internal Revenue Laws and one count charging him with carrying on the business of a wholesale liquor dealer without having paid the special tax required by law. Petitioner was found guilty by the jury on counts two and five and he was acquitted on the remaining three counts. Count two charged petitioner with having possessed and sold 30 gallons of non-tax-paid distilled spirits on April 20, 1960, and count five charged him with carrying on the business of a wholesale liquor dealer without having paid the special tax.

The evidence for the Government, with respect to the two counts upon which the Petitioner was convicted, was based primarily upon the testimony of one Aaron Arnold, a special employee of the Government who had been convicted several times for felonies. This witness testified that he had purchased the liquor from the Petitioner and that he had called him on the telephone to make the necessary arrangements. As corroboration of his testimony the Government offered the testimony of a federal agent as to the contents of a recording of the telephone conversation between Arnold and the Petitioner. The Agent, K. L. Strasser, testified that he recorded the telephone conversation on April 18th; that he had told Arnold of his plans to record the conversation; that Mr. Bernhardt, another Agent, dialed the number and Arnold did the talking. (Page 131 of the Record.) The witness told Arnold that he was going to record the conversation and Arnold said it was perfectly agreeable with him. No evidence was offered by the Government tending to show that either Arnold or the Petitioner had consented for the contents of the conver-

sation to be *divulged* to any other person. The contents of the conversation were objected to by the Petitioner's counsel, and the Court overruled the objection and admitted the evidence.

The United States Court of Appeals for the Fifth Circuit, in affirming the judgment of conviction, recognized that it was the contention of the petitioner *"that the informer was not shown to have consented that the agent divulge or publish the contents of the conversation,"* but held that this same question was decided by the court in the case of *Carnes* v. *United States*, 295 F. 2nd, 598, and refused to reverse the judgment of the trial court on that authority.

A petition for rehearing was filed by petitioner, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on September 12, 1962. A petition for rehearing was denied on October 11, 1962. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

(b) The statutes of the United States, the application and construction of which are involved in this petition for certiorari, are as follows:

47 U.S.C.A. No. 605:

> "no person not being authorized by the sender shall intercept any communication and divulge or

publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

(c) This petition for certiorari is being filed in this case within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2.

The United States Court of Appeals for the Fifth Circuit has misconstrued a statute of Congress by recognizing that permission of the sender of a telephonic communication is a necessary prerequisite to its interception by a third party, but failed to recognize that such a communication cannot lawfully be divulged without the consent of the sender.

3.

The United States Court of Appeals has decided a question of gravity and importance in the administration of federal criminal procedure and the reception of evidence in criminal cases regarding the admission of intercepted telephonic communications where no consent to divulge has been given by the sender.

THE QUESTION PRESENTED

The United States Court of Appeals for the Fifth Circuit erred in deciding that the case of *Carnes* v. *United States*, 295 F. 2nd, 598, was authority for the issue in this case. The Carnes case, supra, did not decide or deal with this same question, nor did it deal with the question of the *permission to divulge* the contents of an intercepted telephonic communication, as is involved in the case at bar.

The question presented in this case is the proper construction of the language of Section 605 of the Communications Act, (47 U.S.C.A. No. 605), which states in part:

> "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

While this court has, in many instances, construed this Act insofar as it concerned permission to *intercept* a communication, it has never construed the Act insofar as it relates to the requirement that there be permission to *divulge* such contents.

The question is one of gravity and importance, and is continuing to become one of the evils of an electronic society, whereby the right to privacy and freedom from the fear of eavesdropping is being slowly but surely whittled away by complacency on the part of trial courts to preserve the rights of individuals.

APPENDIX

Petitioners herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building
Atlanta 3, Georgia

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19390

J. BENJAMIN HALL,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(September 12, 1962)

Before CAMERON, JONES and GEWIN, Circuit Judges.

CAMERON, Circuit Judge: Appellant Hall was found guilty by the jury under two counts of a five count indictment charging the possession and sale of distilled spirits in violation of the Internal Revenue Laws. The Government relied chiefly upon the testimony of an informer who dealt with the appellant several times by telephone conversations. With the consent of the in-

former the Government agents listened to the conversations over an extension telephone and made tape recordings of them. One of the agents while testifying refreshed his recollection from a transcript of the recordings.

Appellant seeks reversal upon his contention that the informer was not shown to have consented that the agent divulge or publish the contents of the conversations. We pass over the Government's argument that proper objection was not made on this ground. Appellant bases his contention on the following portion of 47 U.S.C.A. § 605, which he quotes:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

The question raised by appellant was decided by us within the last few months in the case of *Carnes et al. v. United States*, 1962, 295 F. 2d 598. Based upon that decision and the authorities cited in it, the judgment of the court below is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES

Deputy

New Orleans, Louisiana Oct 23 1962

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,390

D. C. Docket No. 22691 Crim.

J. BENJAMIN HALL,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before CAMERON, JONES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 12, 1962

Issued:

FILED

11th day of October, 1962

GILBERT E. WEAVERS, JR.

Dep. Clerk of the United States Court of Appeals

[487]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 19390

J. BENJAMIN HALL,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Northern District of Georgia.

(October 11, 1962)

ON PETITION FOR REHEARING

Before CAMERON, JONES and GEWIN, Circuit Judges.

PER CURIAM.

IT IS ORDERED that the appellant's petition for rehearing be, and it is hereby DENIED.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	1
Statement	2
Argument	3
Conclusion	4

CITATIONS

Cases:	
Carnes v. *United States*, 295 F. 2d 598, certiorari denied, 369 U.S. 861	3
Ferguson v. *United States*, No. 583 Misc., this Term	4
Rathbun v. *United States*, 355 U.S. 107	3
Statutes:	
Federal Communications Act, Section 605, 48 Stat. 1103, 47 U.S.C. 605	2, 3
United States Code:	
26 U.S.C. 5604	2
26 U.S.C. 5691	2

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 580

J. BENJAMIN HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-8; R. 240-241) is reported at 308 F. 2d 266.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1962 (Pet. App. 9; R. 242). A petition for rehearing (R. 244-246) was denied on October 11, 1962 (Pet. App. 10; R. 247). The petition for a writ of certiorari was filed on November 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether agents who listened, with the consent of an informer, to telephone conversations between the

informer and petitioner arranging for sales of liquor, and made recordings thereof, were properly permitted to testify to what they heard and to refresh their recollection from the recordings.

STATUTE INVOLVED

Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C. 605, provides in pertinent part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was found guilty on one count (Count 2) charging the unlawful sale of untaxed liquor in violation of 26 U.S.C. 5604(a)(1) and on another (Count 5) charging that he carried on the business of a wholesale liquor dealer without having paid the required special tax in violation of 26 U.S.C. 5691(a) (R. 18, 19, 20, 231–232). The court imposed consecutive sentences of imprisonment for two years on each of the two counts (R. 22–23, 234–235). On appeal (R. 236) the conviction was affirmed (Pet. App. 9; R. 242).

The petition challenges the propriety of receiving testimony by government agents, who, with the consent of an informer, Aaron Arnold, listened in on an extension telephone and recorded conversations between the informer and petitioner arranging for sales

of 30 or 60 gallons of whiskey by petitioner to the informer on three separate occasions, *i.e.*, on April 18, 1960 (R. 107–110; 131–132), April 22, 1960 (R. 132–138), and May 3, 1960 (R. 126–129). Before each call, the agents told Arnold that they were going to listen in and make a recording of the conversation (R. 36, 100, 119–120, 155–158). Some of the transcripts of the records were used to refresh the recollection of the testifying agent (R. 109–113; 136–138).

ARGUMENT

This Court decided in *Rathbun* v. *United States*, 355 U.S. 107, that listening in on a telephone, with the consent of one party to the conversation, does not violate Section 605 of the Federal Communications Act since such listening is not an "interception" within the meaning of the statute. In *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861, the rationale of *Rathbun* was held to apply to tape recordings made by one party to a telephone conversation. As the court of appeals observed in *Carnes*, the only difference between a person testifying to a conversation and a recording of such conversation is that the latter has the advantage of being more accurate. This case was properly held to be governed by these decisions. Here, to be sure, the agents listened in and recorded the informer's conversations with his consent, whereas in *Carnes* the recording was of the agent's own conversation. But this difference is of no moment; the

significant fact is that in both situations the listening in was not an interception.[1]

Petitioner endeavors to distinguish the cases cited above on the ground that there was no proof that the informer consented to the divulgence of the communication. Since there was no interception, it is immaterial, however, whether the informer expressly agreed that the agents might divulge or publish the contents of the conversations. In any event, if it were material, there was a sufficient showing that the informer did consent to the divulgence of the conversations. Implicit in the procedure adopted—the recordings of the conversations—was the expectation or understanding that the recordings would be used if necessary, to aid in the prosecution of petitioner.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER 1962.

[1] In this case there was no claim that the recording should have been accompanied by a tone signal and no evidence was developed as to the nature of the recording device used. Petitioner does not raise any issue as to the necessity for a warning signal, sought to be raised in *Ferguson* v. *United States*, No. 583 Misc., this Term. Nor is there here, as there is in *Ferguson*, any question as to state law.

U.S. GOVERNMENT PRINTING OFFICE 1962